

The Use and Abuse of the Doctrine of Vicarious Liability

McIvor, Claire

DOI:

[10.1350/clwr.2006.35.4.268](https://doi.org/10.1350/clwr.2006.35.4.268)

Document Version

Publisher's PDF, also known as Version of record

Citation for published version (Harvard):

McIvor, C 2006, 'The Use and Abuse of the Doctrine of Vicarious Liability', *Common Law World Review*, vol. 35, no. 4, pp. 268-296. <https://doi.org/10.1350/clwr.2006.35.4.268>

[Link to publication on Research at Birmingham portal](#)

General rights

Unless a licence is specified above, all rights (including copyright and moral rights) in this document are retained by the authors and/or the copyright holders. The express permission of the copyright holder must be obtained for any use of this material other than for purposes permitted by law.

- Users may freely distribute the URL that is used to identify this publication.
- Users may download and/or print one copy of the publication from the University of Birmingham research portal for the purpose of private study or non-commercial research.
- User may use extracts from the document in line with the concept of 'fair dealing' under the Copyright, Designs and Patents Act 1988 (?)
- Users may not further distribute the material nor use it for the purposes of commercial gain.

Where a licence is displayed above, please note the terms and conditions of the licence govern your use of this document.

When citing, please reference the published version.

Take down policy

While the University of Birmingham exercises care and attention in making items available there are rare occasions when an item has been uploaded in error or has been deemed to be commercially or otherwise sensitive.

If you believe that this is the case for this document, please contact UBIRA@lists.bham.ac.uk providing details and we will remove access to the work immediately and investigate.

The Use and Abuse of the Doctrine of Vicarious Liability

Claire McIvor*

Abstract Through an analysis of recent case law, this article seeks to highlight the flaws in the current English law approach to the doctrine of vicarious liability. Focusing on the new 'close connection' test for determining the 'course of employment' requirement, it argues that the recent expansion of employer's no-fault liability for the acts of employees has been founded upon a set of principles that are not only theoretically unsound, but also unjustifiable by reference to the normative background of the doctrine of vicarious liability. The article further argues that the judicial reasoning used in these cases indicates fundamental confusion about the nature of the distinction between direct and vicarious liability, and a particular lack of understanding about the concept of the non-delegable duty.

1. Introduction

As a result of a number of key decisions in recent years, there has been a dramatic expansion of the ambit and scope of an employer's no-fault liability for torts committed by employees. More specifically, these decisions have set out a new and broader approach to determining when an employee's tort has been committed during the 'course of employment'. Following *Lister v Hesley Hall Ltd*,¹ *Dubai Aluminium Co Ltd v Salaam*,² *Mattis v Pollock*³ and *Majrowski v Guy's and St Thomas's NHS Trust*,⁴ the traditional 'Salmond' test has now been categorically abandoned by the English courts and replaced with a policy-driven analysis that is loosely founded on a theory of enterprise risk, and ostensibly guided by general notions of justice and fairness. While the movement away from the rigid semanticism that has long been associated with the use of the 'Salmond' formula is to be welcomed, serious concerns are nevertheless to be expressed at what

* Lecturer, University of Birmingham; e-mail c.mcivor@bham.ac.uk. I wish to thank Harvey Teff, Jenny Steele and Keith Stanton for valuable comments that they made on earlier drafts of this article. I am also grateful to the AHRC for funding the period of leave during which this research was carried out.

1 [2001] UKHL 22.

2 [2002] UKHL 48.

3 [2003] EWCA Civ 887.

4 [2005] EWCA Civ 251, [2006] UKHL 34.

can only be described as the sheer amorphousness of the new replacement 'test'. For not only does it lack a sound theoretical foundation, it is also worryingly bereft of any effective control mechanisms, so that, as the primary judicial tool for determining when it is appropriate to impose vicarious liability, it is much too vague and unpredictable. The courts appear to have lost sight of the fact that, as a form of no-fault liability, the doctrine of vicarious liability occupies a highly exceptional position within English tort law, and that its existence is justified by reference to specific distributive justice considerations. They have extended the remit of the doctrine without taking proper account of its normative background, and in doing so they have effected changes to it that are simply unjustifiable in terms of either policy or principle.

A further criticism to be levelled at these recent developments is that they would also appear to be a product of judicial confusion about the nature of the distinction between direct and vicarious liability. While the courts have long struggled with the application of the distinction to corporate bodies and public authorities which, by their nature, function solely through the activities of their employees, the problem in the present context relates specifically to a lack of understanding about the concept of the non-delegable duty. While liability arising from a breach of a non-delegable duty is technically a form of direct liability, it acts like vicarious liability in so far as it operates on a no-fault basis. The notion of the non-delegable duty is most commonly used in the employment context, to impose no-fault liability on an employer for the acts of an independent contractor as regards the execution of certain important tasks. These tasks will relate to the performance of selected core functions that are properly seen to be the responsibility of the employer. The primary function of the non-delegable duty is thus to ensure that employers remain responsible for these key tasks, even in circumstances where they have chosen to delegate the actual performance of the tasks to someone else. In practice, the notion of the non-delegable duty is also used to overcome problems associated with the operation of the employee/independent contractor distinction for vicarious liability purposes. For example, it may be used to thwart an employer who tries to rely on a legal technicality to classify a worker as an independent contractor, so as to avoid incurring automatic liability for any tort committed by that worker during the course of employment. Thus, even if the worker is an independent contractor, if the tort relates to the performance of a non-delegable duty, then liability will still be imposed on the employer on a no-fault basis. While in the past the concept of the non-delegable duty has thus been employed to extend the range of *workers* included within the doctrine of vicarious liability, the recent developments would indicate that the courts are now using it to extend the range

of *conduct* that is covered. It is argued that that is an entirely inappropriate, and indeed illegitimate, extension of its function.

The English tort system cannot easily sustain such a broad regime of no-fault liability. It is thus necessary to rein in the current expansion of the principles of vicarious liability, and to reinstate the doctrine within the confines of a limited and exceptional remit. This will involve a clarification of the specific distributive justice considerations that underlie it and a restatement of the 'course of employment' requirement that is more normatively consistent with this theoretical rationale.

II. The Recent Judicial Expansion of the 'Course of Employment' Requirement

In English law, the first significant recent development in the context of the 'course of employment' requirement of vicarious liability may be traced to the House of Lords decision in *Lister v Hesley Hall Ltd*. The claimants in this case, while residents of a school boarding house between 1979 and 1982, had been sexually abused by the warden who was in control of the day-to-day running of the house. The establishment was owned and managed by the defendants as a private commercial enterprise. In their capacity as the employers of the warden, they were sued by the claimants in respect of the harm inflicted by him on two separate grounds: (1) that they were negligent in their care, selection and control of the warden; and (2) that they were vicariously liable for his torts.

At first instance, the claim in negligence against the employers was dismissed for lack of fault. They did not know that the warden was abusing the boys, and there was no evidence to suggest that they had exercised anything other than reasonable care in hiring the warden and then in conferring upon him the various responsibilities associated with that position. The dismissal of this action was not subsequently challenged on appeal.

As regards the vicarious liability argument, the trial judge held that the employers were not liable for the intentional torts committed by the warden against the boys as, on the basis of existing authority,⁵ these were outside the course of his employment. The trial judge did, however, hold that they were vicariously liable on an alternative ground for the warden's failure to report to them his intention to commit acts of abuse and the harmful consequences to the claimants of those acts. On appeal, the Court of Appeal dismissed that judgment against the defendants, declaring that 'if wrongful conduct is outside the course of employment, a failure to prevent or report that wrong conduct cannot be within the scope of employment so as to make the employer vicariously liable for that

5 *Trotman v North Yorkshire County Council* [1999] LGR 584.

failure when the employer is not vicariously liable for the wrongful conduct itself’.

The claimants were, however, ultimately successful before the House of Lords. While agreeing with the Court of Appeal that vicarious liability could not be established in relation to the warden’s failure to report his wicked intentions, a unanimous House of Lords (Lords Steyn, Clyde, Hutton, Hobhouse and Millett) held that the intentional torts committed by the warden against the claimants could be regarded as falling within the course of his employment, so that vicarious liability arose on this straightforward basis. Clearly determined to provide the claimants with some form of redress, and recognizing that in both the High Court and the Court of Appeal it was the application of the traditional ‘Salmond’ test for determining course of employment that had represented the main obstacle to imposing liability on the defendant enterprise, their Lordships simply crafted a new test that was capable of covering the warden’s independent and deliberate wrongdoing. In coming up with the new test, their Lordships were heavily influenced by two other decisions on the issue of vicarious liability for sexual abuse that had just recently been delivered by the Canadian Supreme Court: *Bazley v Curry*⁶ and *Jacobi v Griffiths*.⁷

i. The Traditional Salmond Test

The ‘Salmond’ formulation,⁸ which, prior to *Lister*, had prevailed as the applicable test for ‘course of employment for nearly a century, provides that an employee’s act will take place during the course of his employment’ if: (a) it has been authorized by the employer;⁹ or (b) it can be regarded as a wrongful and unauthorized mode of doing some act authorised by the employer. Criticised by Atiyah as being ‘an apparently simple test whose simplicity is largely deceptive’,¹⁰ its main problem was its perceived exclusivity. For although it had clearly been formulated with only negligent or careless acts on the part of the employee in mind, and, as such, was not designed to cover intentional torts, it was, nevertheless, always treated as the sole test for determining the ‘course of employment’ question. Thus the courts even purported to apply it to cases involving intentional torts. Given the kind of deliberate and wilful misconduct that tends to form the basis of the intentional torts, the conclusion usually reached in these instances was that the employee’s act fell

6 (1999) 174 DLR (4th) 45.

7 (1999) 174 DLR (4th) 71.

8 So-called because it is based on a passage from *Salmond on Torts*, 1st edn (Stevens and Haynes: London, 1907) 83, 84.

9 In fact, this is not a true example of vicarious liability at all. It is now widely recognized that an employer who authorizes the commission of a tort will instead be directly liable for the relevant conduct of the employee.

10 P. S. Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths: London, 1967) 172.

outside the course of employment. And although the courts did occasionally designate some form of intentional wrongdoing as an unauthorized mode of doing an authorized act, so as to engage the mechanisms of vicarious liability, this was only achieved by applying the formula in a rather strained and artificial manner.¹¹ Thus in *Lloyd v Grace, Smith & Co*,¹² the House of Lords held a firm of solicitors vicariously liable for the dishonesty of its managing clerk who persuaded a client to transfer property to him and then disposed of it to his own advantage. Their decision was based on the ground that the employee was acting within the apparent scope of his authority from his employers in dealing with the property. In this respect, it was considered crucial that the client had been specifically invited by the firm to deal with its managing clerk. Also, in *Morris v C W Martin & Sons Ltd*,¹³ an employer was held liable for an employee's theft of a mink stole that had been bailed to the employer for cleaning purposes. The Court of Appeal held that, having been placed in charge of the fur while it was being cleaned, the manner in which the employee conducted himself in that work was to convert it, so that '[w]hat he was doing, albeit dishonestly, he was doing in the scope or course of his employment in the technical sense of that infelicitous but time-honoured phrase'.¹⁴ As Giliker comments, it remains unresolved how such actions could be said to be an unauthorized means of performing a particular duty, for such actions could easily be said to negate the task the employee has been authorized to undertake.¹⁵

Difficult to reconcile with the above decisions is the Court of Appeal's decision in *Trotman v North Yorkshire Council*.¹⁶ In this case, a deputy headmaster of a special school sexually assaulted a mentally handicapped pupil while on a school trip to Spain. His actions were said not to fall within the course of his employment, even though part of this particular teacher's task of caring for the pupil involved sharing a bedroom with him. According to Butler-Sloss LJ, even though he had clearly taken advantage of the opportunity created by the care arrangements to carry out the sexual assaults, his conduct was still 'far removed from an unauthorized mode of carrying out a teacher's duties on behalf of his employer'. On the contrary, she regarded it as 'a negation of the duty of the council to look after children for whom it was responsible'.¹⁷

In *Lister*, both the High Court and the Court of Appeal were bound by the *Trotman* decision. The House of Lords, however, had

11 Described by Atiyah, above n. 10, as the use of 'verbal sleight of hand'.

12 [1912] AC 716.

13 [1966] QB 716.

14 *Ibid.* at 737, per Diplock LJ.

15 P. Giliker, 'Rough Justice in an Unjust World' (2002) 65 *MLR* 269 at 271.

16 [1999] LGR 584.

17 *Ibid.* at 591.

no hesitation in deciding to overrule it. The principal criticism that the House of Lords levelled at the approach adopted by the Court of Appeal in *Trotman* was that, in adhering so rigidly to the precise language of the Salmond test, it had proceeded on the basis of a 'rather restricted and technical view of the dispute',¹⁸ and thus failed to focus on what the House of Lords considered to be the most important factor; namely, the overriding duty of the employer to exercise reasonable care over the children on the trip, and its delegation of this duty to the deputy headmaster.¹⁹

The House of Lords realized that one of the main defects of the traditional test was that it required a very specific and formulaic inquiry into the acts that the employee was employed to do, and the particular acts that he was engaged in when the torts were committed. But as pointed out by Atiyah, 'this is not a question which permits of a simple and scientific answer, because "acts" can be described—and accurately described—at varying levels of particularity'.²⁰ Thus, the answer to the crucial legal question of whether the employee's tort was committed during the course of employment can vary depending on the nature of the description given to the job that he or she was actually employed to do. It is possible to describe a particular task using language that is inherently incompatible with the phrase 'unauthorized mode of performing an authorized task'. By way of example, and using the facts of *Trotman*, if the 'authorised task' of the deputy headmaster is described, as it indeed was by Butler-Sloss LJ in the Court of Appeal, as that of 'caring for a handicapped teenager while on a foreign holiday',²¹ then the actual carrying out of a sexual assault on the boy is of course going to seem far removed from being an unauthorized mode of performing this task. The notions of 'caring' and 'abusing' are simply irreconcilable. If, however, the professionally conferred duties of the headmaster in the circumstances are cast in more specific terms, and can be said to include the responsibility of sharing a room with the boy at night, it becomes easier to construe the conduct as an unauthorized mode of carrying out this task. Such sophistry is clearly not a defensible feature of the Salmond test.

In order to come up with a rational method of applying the 'course of employment' requirement to the intentional torts, it is necessary to consider the specific purpose that this requirement is said to serve within the vicarious liability inquiry. Fortunately the House of Lords in *Lister* did exactly that, and the solution that they

18 [2001] UKHL 22 at para. 21.

19 *Ibid.* at para. 25.

20 *Above n. 10 at 181*, as noted by Lord Steyn in *Lister*, above n. 18 at para. 23.

21 [1999] LGR at 591.

came up with represents a clear improvement in the law in this respect.²² The primary function of the 'course of employment' requirement is to ensure that the employee's tort is sufficiently linked to the employer's enterprise, so as to justify the imposition of liability on the employer. It thus limits the responsibility of the employer to acts committed by the employee qua employee, and excludes those related to personal or private life. In this vein, the new test formulated by the House of Lords provides that an act will be deemed to have been committed during the 'course of employment'²³ if there is a 'close connection' between the conduct and the employment. In determining such issues, the courts are to be guided by the 'justice' and 'fairness' of imposing liability on the employer in the circumstances. As will be seen, it is this extremely vague 'policy' aspect of the test that gives serious cause for concern.

ii. The 'Close Connection' Test

In formulating the 'close connection' test in *Lister*, the House of Lords attempted to emulate the approach adopted by the Supreme Court of Canada in *Bazley v Curry*. The defendant in this case was a 'not-for-profit' organization which operated two residential care facilities for emotionally troubled children, and it was sued on a vicarious liability basis in respect of the actions of an employee in sexually abusing a resident of one of the homes. A very special feature of the regime of care implemented in these homes was that it involved 'total intervention' in all aspects of the lives of the children cared for, with employees effectively acting as substitute parents and being expected to do everything that a parent would do, 'from general supervision, to intimate duties like bathing and tucking in at bedtime'. This state of affairs proved to be central to the finding of liability in this case.

Giving the main judgment of the court, McLachlin J began by stating that, in the absence of any clear precedent on the issue, it was necessary to turn to policy for guidance. This involved looking at the purposes that vicarious liability serves and asking whether the imposition of liability in the case at hand would serve those purposes.²⁴ Examining the apparent policy considerations underlying the doctrine, she then concluded that it was justified essentially by the principles of fair and efficient compensation and deterrence.

22 As Peter Cane would indeed agree: 'Vicarious Liability for Sexual Abuse' (2000) 116 *LQR* 21.

23 Lord Clyde in *Lister* expressed a preference for use of the phrase 'scope of employment' over that of 'course of employment', at least '[i]n so far as the liability on employer arises through the scope of the authority which the employer has expressly or impliedly delegated to the employee' (above n. 18 at para. 36). As will be seen below pp. 288–96, such reasoning may be seen to indicate a misunderstanding of the law on non-delegable duties.

24 See (1999) 174 *DLR* (4th) 45 at para. 14.

This is where concern may initially be expressed, for as justifications for the imposition of onerous no-fault liability, such notions come across as being worryingly nebulous. Unfortunately, this initial disconcertion at the vagueness of these so-called 'principles' is only heightened by further reference to the actual reasoning employed by McLachlin J in this respect, for it is so abstract and hazy as to be devoid of any useful meaning. Her concept of 'fair and efficient compensation' is arguably premised upon a very loose combination of basic risk theory and a 'deep pockets' rationale²⁵ that takes no account of the realities of the circumstances actually in play. In particular, she assesses the concept of 'fairness' solely from the perspective of the victim and in terms of the victim's need for a remedy, when arguably it relates more to the position of the defendant and the question of whether there are good reasons in the circumstances for making him take legal responsibility for harm that he has not personally caused. As regards the notion of deterrence, her reasoning that the imposition of vicarious liability will encourage employers to engage in 'imaginative and efficient administration and supervision' to reduce the risk of further harm comes across as rather naïve and simplistic.²⁶ Essentially, she applies a standard enterprise risk argument to a 'not-for-profit' organization providing a quasi-public service, without making any allowances for the special status of the defendant in this respect.²⁷ As such, her argument is severely compromised, for as will be seen in the following section, it illustrates her lack of understanding about the actual theoretical foundation of the doctrine of vicarious liability.

Although the House of Lords in *Lister* adopted the basic 'close connection' test set out in *Bazley*, they expressly refused to endorse the economic efficiency rationale used by McLachlin J.²⁸ This would have been to their credit, given the above criticism about the nature of

25 She states that: '[e]ffective compensation must also be fair, in the sense that it must seem just to place liability for the wrong on the employer. Vicarious liability is arguably fair in this sense. The employer puts in the community an enterprise which carries with it certain risks. When those risks materialize and cause injury to a member of the public despite the employer's reasonable efforts, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss. This accords with the notion that it is right and just that the person who creates a risk should bear the loss when the risk ripens into harm. While the fairness of this proposition is capable of standing alone, it is buttressed by the fact that the employer is often in the best position to spread the losses through mechanisms like insurance and higher prices, thus minimizing the dislocative effect of the tort within society' (*ibid.* at para. 31).

26 *Ibid.* at para. 33.

27 She emphatically rejects the argument that an exception regarding the imposition of vicarious liability ought to be made in relation to non-profit-making organizations: 'The suggestion that the victim must remain remediless for the greater good smacks of crass and unsubstantiated utilitarianism' (*ibid.* at para. 54). In responding to this statement in *Jacobi v Griffiths*, Binnie J identifies very succinctly the deeper issues with which she fails to engage: see (1999) 174 DLR (4th) 71 at para. 76.

28 See, in particular, Lord Hobhouse's speech: [2001] UKHL 22 at para. 60.

the economic arguments employed, had their rejection been based on a considered assessment of the pertinence of these particular arguments in the circumstances. Surprisingly, however, their lordships²⁹ simply declined to consider the theoretical basis of the doctrine of vicarious liability at all. So while they were advocating the use of the Canadian 'close connection' test, and indeed directing that the *Bazley* decision be used as a starting-point for the consideration of such issues in the future,³⁰ they nevertheless dismissed the theoretical reasoning that formed the basis of the test and offered nothing in its place. As Giliker comments, this makes it difficult to see how future courts could meaningfully refer to McLachlin J's guidelines at all, given that they can only really be understood within the context of their underlying economic rationale.³¹

Looking at the manner in which their lordships applied the 'close connection' test in *Lister* itself, it becomes clear that they were in favour of a much broader policy-based approach than that set out by the Canadian Supreme Court. Rather than looking back to the original normative justifications for the existence of the doctrine of vicarious liability, they preferred to look forward, as it were, and to focus more on its perceived objectives. In this respect, they appeared to conclude that vicarious liability was based essentially on the idea that a person who employs another for his own ends inevitably creates a risk that the employee will commit a legal wrong and that employers ought accordingly to be liable for the creation of such a risk. The main function of vicarious liability was thus to provide compensation to those vulnerable persons who, through no fault of their own, were exposed to the inherent risks of the employer's business. In the words of Lord Millett: '[E]xperience shows that in the case of boarding schools, prisons, nursing homes, old people's homes, geriatric wards, and other residential homes for the young or vulnerable, there is an inherent risk that indecent assaults on the residents will be committed by those placed in authority over them, particularly if they are in close proximity to them and occupying a position of trust'.³²

In setting up the residential care homes, the defendant in *Lister* had thus created a risk that its homes would become the setting for sexual abuse of children. By accepting the claimant as a resident in one of its homes, it had moreover undertaken a responsibility for his care and welfare. The fact that it had entrusted this responsibility to the warden, that it had placed him in a special position of authority so as to enable him to discharge this responsibility effectively, and that it was in carrying out this particular responsibility that the warden had

29 Lord Millett did make some attempt to look at the policy behind the doctrine, but his examination of the relevant literature was cursory and he concluded that it was best understood as a loss-distribution device: *ibid.* at para. 65.

30 *Ibid.* at para. 27.

31 Above n. 15 at 274.

32 [2001] UKHL 22 at para. 83.

abused the claimant, all combined to establish the necessary 'close connection' between the conduct and the employment. As the innocent victim, the claimant was entitled to receive compensation and in the circumstances it was appropriate to impose on the defendant the obligation to provide this remedy.

Although the form of risk theory that was applied by the House of Lords in *Lister* was clearly much wider and more generalized than the economic rationale set out by McLachlin J in *Bazley*, it is undoubtedly the case that the same outcome would have been reached under both. For the facts of *Lister* were arguably so exceptional as to satisfy even the more stringent Canadian approach—the warden did after all have sole responsibility for most aspects of the residents' general care and acted almost as a parent figure.³³ Thus, while the particular method used by the House of Lords to impose liability may have been questionable, the end result achieved may be regarded as relatively uncontroversial. Rather it is argued that the problem lies in the signals that the decision would appear to send out to future litigants about the extent of non-fault liability for an employee's intentional wrongdoing. In using very loose risk-based reasoning, and failing to qualify it at all in terms of the special factors pertaining to the case, their lordships would appear to have produced an inordinately broad *ratio* that is susceptible to inappropriate manipulation. As Giliker points out, it is not the mere existence of some form of risk creation that is the key, but rather the *level* of the risk that is inherent in the employment.³⁴

Moreover, it would have been very easy in the circumstances to have emphasized the relevance of the degree of the risk, for this could have been achieved by merely contrasting the decision in *Bazley* with that of its companion case, *Jacobi v Griffiths*. In *Jacobi*, a majority of the Canadian Supreme Court refused to impose vicarious liability on a 'not-for-profit' organization operating a children's club in respect of acts of sexual abuse committed against two children by an employee of the club. By contrast with the establishment in *Bazley*, the club provided merely a recreational facility for children. The perpetrator of the abuse had been employed only to supervise volunteer staff and to organize recreational activities and the occasional outing. Crucially, although he had been encouraged to form friendships and a positive rapport with the children, he had not been employed to act as a substitute parent or to interact with them in an intimate manner.³⁵ In short, the defendant's enterprise did not create a significant risk of

33 As pointed out by Lord Steyn, the residential homes were intended to be a home for the boys and not just an extension of the school environment: *ibid.* at para. 4.

34 Above n. 15 at 278.

35 Per Binnie J: 'I do not want to be taken as suggesting that the creation of a parent-type relationship constitutes a precondition to vicarious liability in child abuse cases. However, not only do the "parental" cases have a particular relevance to the facts of this appeal, they show how high the courts have set the bar before imposing no-fault liability' ((1999) 174 DLR (4th) 71 at para. 64).

abuse and could not therefore be said to have significantly contributed to the occurrence of the victims' harm. The link between the harm and the employment was simply too remote.³⁶

It is argued that in failing to make the point that the 'close connection' test would generally only be satisfied where the employment created a high degree of risk of the harm occurring, the House of Lords were courting trouble. Unfortunately, these misgivings about the decision would appear to be all too readily confirmed by an analysis of subsequent case law.

iii. Post-Lister Applications of the 'Close Connection' Test

In English law, the 'close connection' test has since been directly applied in the following cases: *Dubai Aluminium Co Ltd v Salaam*,³⁷ *Mattis v Pollock*,³⁸ and *Majrowski v Guy's and St Thomas's NHS Trust*.³⁹ It will be seen that, as a direct result of the vagueness of the guidance provided in *Lister*, each of these decisions brings the law on vicarious liability into further disarray.

Dubai Aluminium concerned the vicarious liability of a firm of solicitors for the dishonest acts of one of its partners. The partner in question had acted as the solicitor for a third party and, through his drafting of certain documents, had knowingly assisted this client to defraud Dubai Aluminium out of almost \$45 million. This solicitor did not, however, benefit personally from the fraud, and it was moreover accepted that his co-partners were entirely innocent of any wrongdoing. In settlement of a claim brought against the firm in respect of the offending partner's equitable wrong of dishonest participation in a breach of trust, the firm paid out \$10 million to Dubai Aluminium. The firm then sought a contribution, under the provisions of the Civil Liability (Contribution) Act 1978, from the main third-party perpetrator of the fraud. Under the Partnership Act 1890, s. 10, however, this claim for contribution depended on the firm's being able to show that it was legally responsible for the wrongful acts committed by the partner. Paradoxically, therefore, this was a scenario where it was actually in the defendant's interest to be held vicariously liable for the acts of the partner. That the highly exceptional nature of the claim in this respect was central to the outcome of this case is thus an important factor to be borne in mind when it comes to interpreting its *ratio*.

In applying the 'close connection' test to the circumstances of this case in order to determine the 'course of employment' requirement, the House of Lords unfortunately failed to elaborate much further on the 'guidance' that they had set out in *Lister*, apart from to emphasize the importance of considering the 'justice' and 'fairness' of imposing vicarious liability on the defendant. The claim in *Dubai* was very

36 See also *EB v Order of the Oblates of Mary Immaculate* [2005] 3 SCR 45.

37 [2002] UKHL 48.

38 [2003] EWCA Civ 887.

39 [2005] EWCA Civ 251, [2006] UKHL 34.

straightforward in this respect. The firm had not engaged in any wrongful conduct, and to have dismissed the claim would have allowed the third-party fraudsters to have remained in possession of considerable sums of misappropriated moneys. Recognizing that the firm was vicariously liable for the acts of the partner thus enabled it to engage the contribution provisions and to ensure that the real wrongdoers in the situation ultimately had to shoulder the burden of compensating Dubai Aluminium.

The situation in *Dubai* was, however, unique. Outside of such a scenario, it is submitted that the application of the notions of 'justice' and 'fairness' will not be so clear cut. The House of Lords in this case, in line with the position that they had adopted in *Lister*, did not place these concepts within the context of the economic rationale applied by McLachlin J and, consequently, it is argued that all that they really ended up doing was making the 'close connection' test even more elusive. For 'justice' and 'fairness' are wholly subjective concepts that are only capable of taking on any real meaning when applied against the backdrop of an articulated set of core values. Taken abstractly, they provide no guidance to future courts and will certainly not help to make the law on vicarious liability more certain or predictable.

No better example of the unhelpfulness of the bare notions of justice and fairness is provided than that of the Court of Appeal's decision in *Mattis v Pollock*.⁴⁰ This case revolved around the actions of a nightclub doorman in stabbing and seriously injuring a customer of the club. The doorman in question had been involved in an altercation with some friends of the victim and was subsequently forced to flee from the club to the safety of his nearby flat. Humiliated by what had happened, the doorman later armed himself with a knife and returned to the vicinity of the nightclub in search of revenge. Identifying the victim as part of the relevant group, he then attacked him with the knife and severed his spinal cord, thereby rendering him paraplegic. The doorman was subsequently convicted at the Crown Court of causing grievous bodily harm and sentenced to a term of imprisonment.

Rather than suing his actual attacker, presumably for reasons of impecuniosity, the victim brought an action against the owner of the nightclub, arguing vicarious liability on the grounds that the attack had been carried out by the doorman during the course of his employment, and also ordinary direct liability for breach of a personally-owed duty of care. As regards vicarious liability, the Court of Appeal explicitly incorporated the notions of 'justice' and 'fairness' into the 'close connection' test, Judge LJ setting out that the broad issue for the Appeal Court to determine was whether the assault was so closely connected with what the defendant authorized or expected of the doorman in his employment at the nightclub, that it would be fair and

40 For an insightful commentary on this decision, see R. Weekes, 'Vicarious Liability for Violent Employees' [2004] *CLJ* 53.

just to conclude that he was vicariously liable for the harm inflicted upon the victim.⁴¹ In deciding that it was fair and just in the circumstances to impose vicarious liability, the Appeal Court appeared to have been primarily influenced by evidence of fault on the part of the defendant nightclub owner. It seems that the defendant had actively encouraged the doorman to perform his duties in an aggressive and intimidatory manner. Indeed, the Appeal Court was made aware of two previous occasions on which, to the knowledge of the defendant, the doorman had acted violently towards customers. It seems that some of his fellow employees were so concerned about his aggressive behaviour that they even reported him to the defendant. Damningly for him, however, their testimony indicated that, far from taking their concerns seriously, the defendant actually approved of the doorman's behaviour and was happy that he could rely on him to intimidate customers and thereby keep order.⁴² On top of all this, it also emerged that, contrary to the regulations then in force, the doorman had not been registered with the relevant licensing authority, and that the defendant had acted unlawfully in knowingly employing him as such.

That evidence of fault is not an appropriate justificatory basis for the imposition of no-fault liability hardly needs to be stated. Moreover, the message that the Court of Appeal's decision in *Mattis* actually sends out is that it is not even necessary to refer to legal notions of fault in these cases, for in future judges will be expected to determine vicarious liability issues by simply applying their own value judgments to the facts of each individual claim. The truth of the matter is that the Court of Appeal was confused about the distinction between direct and vicarious liability in this case.⁴³ From the emphasis that the members of the Court of Appeal placed on the acts of encouragement given to the doorman by the defendant club owner, it is clear that their conclusions were heavily based on notions of authorization. And although the first limb of the old Salmond test refers to authorized wrongdoing and thereby implies that it gives rise to vicarious liability, it has long been recognized that it relates instead to a form of direct liability based on the personal responsibility of the defendant.⁴⁴ If authorization did indeed lie at the heart of the *Mattis* decision, then it is argued that the Court of Appeal should have expressly addressed the issue of whether the defendant's encouragement of the generally aggressive behaviour of the doorman was strong enough to be taken as extending also to the latter's premeditated actions in stabbing the victim pursuant to a private vendetta. It is submitted that, on the night

41 [2003] EWCA Civ 887 at para. 19.

42 *Ibid.* at para. 9.

43 That the members of the Court of Appeal were prepared to conclude that the facts of the case also supported a finding of direct liability, without engaging in any real discussion of the apparent grounds for the direct liability argument, is further proof of their elision of the distinction between direct and vicarious liability.

44 As recognized by Lord Millett in *Lister*, above n. 18 at para. 67.

in question, the lapse of time between the scuffle in the club involving the doorman and the victim's friends, and the doorman's return to the general vicinity of the club in the early hours of the morning in search of the group, would certainly constitute a significant obstacle to the reaching of such a conclusion.

And finally, the most recent application of the 'close connection' test is to be found in the Court of Appeal's decision in *Majrowski v Guy's and St Thomas's NHS Trust*.⁴⁵ This case unfortunately provides a stark illustration of just how far the courts have lost their way on this matter. The claimant in this case alleged that while working as a clinical audit coordinator for the defendant NHS Trust (hereafter 'the Trust'), he was bullied, harassed and intimidated by his departmental manager. Arguing that this amounted to harassment in breach of the Protection from Harassment Act 1997, s. 1, he brought a claim for damages against the Trust under the 1997 Act, s. 3, on the grounds that it was vicariously liable for the conduct of the departmental manager.

The key issue for the Court of Appeal to decide was whether the doctrine of vicarious liability applied to breaches of statutory duty, and more specifically, to a breach of the 1997 Act. Upholding the claim, the Appeal Court set out that, as a general rule, employers could be vicariously liable for breach of a statutory duty, unless the statute in question excluded such liability. In the absence of any express exclusion, it remained to be considered whether there were any policy reasons for reading such an exclusion into the statute. As regards the 1997 Act, a majority⁴⁶ held that vicarious liability was not so excluded. More significantly, however, in relation to the 'course of employment' requirement, a new slant was added to the 'close connection' test. Auld LJ, giving the main judgment of the Court of Appeal and relying on recent jurisprudence, notably the decisions of the House of Lords in *Lister* and *Dubai Aluminium* and *dicta* from the Privy Council decision in *Bernard v Attorney General of Jamaica*,⁴⁷ set out that the new and broader approach was to assess whether the employee's unlawful conduct was so closely connected with the nature and circumstances of his employment, and/or whether the risk of the breach was one so reasonably incidental to it, that it would be fair and just to hold the employer vicariously liable. Immediately, it can be seen that a whole new limb has been added to the test and that now, as an alternative to establishing the necessary 'close connection', it will suffice to show that the employee's wrongdoing represented a risk that was 'reasonably incidental' to the nature of the employment.

Far from being an established sufficient condition of liability as suggested by Auld LJ, the notion of 'reasonably incidental risk' has only ever featured previously in highly context-specific *obiter dicta*,

45 See further, C. McIvor, 'Reinventing the doctrine of vicarious liability – again!' (2005) 21 PN 283.

46 Auld and May LJ, Scott-Baker LJ dissenting.

47 [2005] IRLR 398

and has certainly never been portrayed as a principle of general applicability. In *Dubai*, Lord Millett merely uses the idea of the employee's wrongdoing being a risk that is reasonably incidental to the employer's business to justify the application of the vicarious liability doctrine to equitable wrongdoings as well as to the established liabilities arising at common law and by statute. By contrast, in *Majrowski*, Auld LJ makes the 'reasonably incidental risk' idea an integral part of the test for determining whether vicarious liability will arise on the facts of an individual case, which is a completely different and much more controversial matter.

In *Bernard v Attorney General of Jamaica*, Lord Steyn's references to the 'reasonably incidental risk' notion are similarly qualified by context. The claimant in this case was shot and then arrested by a police officer in Kingston, Jamaica, as he tried to make an international call from a public telephone. The officer had demanded use of the phone, and when the claimant refused to comply, an altercation ensued, during which the officer pulled out his service revolver and fired at the claimant's head. While the claimant was recovering in hospital from his injuries, the officer placed him under arrest for allegedly assaulting a police officer and handcuffed him to the bed. Criminal charges were then brought against the claimant, although these were later withdrawn.

The claimant brought actions for assault, false imprisonment and malicious prosecution against the police officer and sought to hold the Crown, as his employer, vicariously liable for his conduct. Applying the principles set out by the House of Lords in *Lister*, the Privy Council (Lords Bingham, Steyn, Millett, Scott and Carswell) set out that the correct approach to determining whether an employer is vicariously liable for an employee's intentional torts is to concentrate on the relative closeness of the connection between the nature of employment and the particular tort, and to ask whether, looking at the matter in the round, it is just and reasonable to hold the employer vicariously liable. In this respect, the evidence of the constable's announcement that he was a police officer prior to shooting the claimant, and the fact that he had later arrested him for allegedly interfering with the execution of his duties as a police officer were held to be of crucial importance. Giving the main judgment of the Board, Lord Steyn also stated that it was necessary to take into account the relevance of the risk created by the fact that the police authorities routinely permitted police officers to take loaded service revolvers home, and to carry them while off duty.⁴⁸ However, he made it clear that this factor on its own was *not* capable of making the police authority vicariously liable. The dominant feature of the case, and the main reason why vicarious liability was imposed, was the fact that the offending officer had, at all material times, purported to act as a police officer. The risk created by

48 *Ibid.* at para. 27.

the carrying of the gun was merely an additional factor lending weight to the overall vicarious liability argument.⁴⁹

In presenting the 'reasonably incidental risk' notion as a stand-alone test for determining vicarious liability, the Court of Appeal in *Majrowski* may be seen to apply a very loose version of risk theory as the normative foundation of the doctrine. The Court of Appeal refers to very general notions of loss distribution and promotes deterrence and compensation as the primary objectives of the vicarious liability regime. Against this backdrop, the overarching guiding principles of 'justice' and 'fairness' will be satisfied whenever an innocent victim receives compensation from the creator of the risk of harm. From the facts of *Majrowski*, it would further appear that the risk of harm in the circumstances does not have to be particularly strong. The Trust was said to have created the risk of harassment by simply placing the departmental manager in a position of authority over the claimant. By this reasoning, all employers who operate a hierarchial staffing system will be vulnerable to such liability.

Unfortunately, a valuable opportunity to rectify this situation was then missed when, on appeal to the House of Lords, the Trust chose to contest only the finding of the Court of Appeal that the doctrine of vicarious liability applied to breaches of the Protection from Harassment Act 1997.⁵⁰ In dismissing the appeal, the House of Lords therefore did not even have to make reference to the application of the 'close connection' test.

Majrowski demonstrates the dangers of the broad policy-based approach to determining questions of vicarious liability. The courts need clearer guidance than that provided by the vague and unqualified principles of 'justice' and 'fairness'. In order to formulate such guidance, it is necessary to have a clear idea about the normative foundation of the doctrine and its specific purpose. For, contrary to the impression given by both the House of Lords and the Court of Appeal, vicarious liability is not just a simple mechanism for distributing losses and providing compensation. It is founded rather on very precise distributive justice theory, the details of which it is important to understand.

49 See [2005] IRLR 398 para. 28. Useful reference may also be made here to the Privy Council decision in *Attorney General of the British Virgin Islands v Hartwell* [2004] 1 WLR 1273. In this case, a probationary police officer was said not to have been acting in the course of his employment when, in a fit of jealous rage at finding his girlfriend in a bar with another man, he used a police service revolver to shoot and injure the claimant. He was not acting as a police officer at the time, but had instead abandoned his post and embarked on a vendetta of his own. See also *Brown v Robinson* [2004] UKPC 56, in which the actions of a security guard in shooting a gatecrasher were said to fall within the course of his employment, for the simple reason that he had been ostensibly acting in his capacity as a security guard throughout the entire incident. His conduct thus amounted to an unauthorized mode of performing his duty to preserve order.

50 [2006] UKHL 34.

III. The Normative Foundation of the Doctrine of Vicarious Liability

As pointed out by Atiyah, the reason why the existence of the doctrine of vicarious liability needs to be specifically justified is that the very idea of holding one person liable, on a no-fault basis, for the acts of another runs counter to two fundamental principles of English tort law: namely that people should only be liable for harm caused by their own acts or omissions, and that people should only be liable where they have been at fault.⁵¹ The justifications for the doctrine of vicarious liability have, however, changed over time. In 1916, Baty famously identified nine different grounds that had, at one time or the other, been put forward in support of the doctrine.⁵² Of these, the most important were the arguments that the employer had control of the activities of his employees, that he benefited from their labours and that he was generally in a better financial position than his employees to meet the cost of claims.

Writing in 1967, Atiyah acknowledged the continued significance of the majority of the traditional justifications that had been analysed by Baty, but concluded that the principle of loss distribution had become the most rational modern explanation for the existence of the doctrine.⁵³ On this view, the doctrinal basis of vicarious liability was said to lie in the basic moral idea that someone who obtains a benefit from an act should also have to bear the risk of loss from that act. This reasoning, combined with the notion that the employer will have contributed to the risk of the harm by deciding to operate the enterprise the question and by choosing to employ the tortfeasor, would then be used to validate the initial targeting of the employer. However, ultimately, it was the knowledge that he would be able to distribute the cost of harm in an economically efficient and expedient manner that would have persuaded us to accept this particular form of no-fault liability as both a necessary and appropriate tool for the promotion of overall justice. In short, at this time, the doctrine of vicarious liability was thought to be justified essentially by the combination of a basic enterprise risk notion and a loss distribution argument, with the latter constituting the weightier of the two.

The notions of economic efficiency and expedience are central to the justificatory nature of the loss distribution principle in this context. Contrary to the impression that has arguably been created by the emphasis placed in *Bazley*, *Lister* and *Majrowski* on the bare notions of compensation and deterrence, the principle is *not* to be understood in the looser sense of referring to a simple 'deep pockets' argument. That employers are generally in a better financial position than their

51 Above n. 10 at 12.

52 T. Baty, *Vicarious Liability. A Short History of the Liability of Employers, Principals, Partners, Associations and Trade Unions etc.* (Clarendon Press: Oxford, 1916).

53 Above n. 10, at 27.

employees, and thus represent the surest compensation source for victims is not, of itself, a strong enough reason for making them subject to a regime of no-fault liability. It is rather their ability to pay taken in conjunction with the fact that they will then be able to spread the loss by passing the costs of the claims on to consumers through small increases in the price of their products or services that makes the imposition of vicarious liability seem just and fair in the circumstances. As pointed out by Atiyah, since most employers are corporations rather than individuals, then even where they are unable to pass the costs on through higher prices, perhaps because the market competition is too strong, they will still be able to engage in a considerable degree of loss spreading by distributing losses amongst 'those who, in a commercial sense, constitute the enterprise itself, i.e., the shareholders and staff and employees of the enterprise. Shareholders may receive a slightly lower dividend and employees may receive a smaller wage increase'.⁵⁴

There is also a further economic argument to the effect that enterprises need to bear the costs of the harm caused by their operations in order to ensure efficiency in the allocation of national resources. Calabresi, for instance, asserts that costs of harm must be recognized as part of the overall costs of the business and thus taken into account in determining the true costs of the enterprise.⁵⁵ The theory is that as the costs of the enterprise rise, action will be taken to reduce costs by increasing efficiency. Therefore, it is only through knowledge of the true costs of the enterprise that optimum efficiency can be achieved and the forces of market competition thus be properly engaged.

Applied strictly, this 'enterprise risk combined with efficient loss distribution' explanation of vicarious liability only really provided a strong justification for the imposition of vicarious liability against 'for-profit' organizations. 'Not-for-profit' organizations, such as charities, voluntary groups or public authorities in the context of their provision of various public services, do not exist for the primary purpose of obtaining personal benefits, so that the moral argument that those who take advantage of others to pursue their own gains should have to bear the losses associated with the third-party conduct does not hold very much initial sway. Nor can such organizations undertake the kind of convenient and efficient loss distribution described by Atiyah. As recognized by Binnie J, in delivering the majority decision in *Jacobi v Griffiths*, the 'not-for-profit' employer 'does not operate in a market environment and has little or no ability to absorb the cost of such no-fault liability by raising prices to consumers in the usual way

⁵⁴ Above n. 10, at 23.

⁵⁵ G. Calabresi, 'Some Thoughts on Risk Distribution and the Law of Torts' (1960) 70 *Yale LJ* 499. This theory is discussed by Atiyah with a certain degree of cynicism: above n. 10 at 25.

to spread the true cost of “doing business”. It has no efficient mechanism to “internalize” the cost’.⁵⁶

At the time when Atiyah was writing, however, there was a relatively clear and settled distinction between services provided by ‘for-profit’ organizations and those provided by ‘not-for-profit’ ones, with only the former being routinely subjected to the principles of vicarious liability. Since then, the distinction between the public and private sector has become very blurred. For example, many public services have undergone varying degrees of privatization, and there is now a great deal of overlap between the range of services provided by ‘for-profit’ and ‘not-for-profit’ concerns. This means that ‘not-for-profit’ employers are now just as likely as their ‘for-profit’ counterparts to be targeted by a vicarious liability claim. From the point of view of victims of harm caused by a ‘not-for-profit’ enterprise, it would be clearly inequitable to deprive them of compensation on the sole ground that the defendant employer in question would be unable to spread his losses with the same degree of convenience and efficiency as an ordinary ‘for-profit’ employer. In short, there is an expectation today that all employers be treated alike in this context.

In order to meet these changes in the structure of modern society, the theoretical justifications for the doctrine of vicarious liability have had to be modified. This has meant a movement away from the loss distribution principle and towards the enterprise risk argument as the primary explanatory factor. There has thus been a basic shift in the balance of the traditional justifications. This is very clearly evidenced in the recent case law, most notably in *Lister* and *Majrowski*, with great emphasis now being placed on the idea that the defendant employer has created the relevant risk of harm in the first place.

On this basis it is at least possible to understand why there has been greater use of basic risk theory in vicarious liability cases, and even to accept that this has been both necessary and appropriate in terms of justifying the continued existence of the doctrine within our current tort system. Nevertheless, it is contended the courts are currently applying the enterprise risk argument to vicarious liability claims in a manner that is both inappropriate and disproportionate. For although the enterprise risk argument may have overtaken the loss distribution principle in terms of relative importance as a justification for vicarious liability, this does not mean that it has become the sole explanation for its continued existence and that the loss distribution principle had become entirely irrelevant. They still come together to justify the doctrine, and it is merely the nature of their interrelationship that has changed.

Not only are the courts currently failing to accord adequate significance to the notion of efficient loss distribution in determining vicarious liability issues, they are relying on too broad a concept of

56 (1999) 174 DLR (4th) 71 at para. 71.

enterprise risk. In the context of the recent developments in the law in relation to the 'course of employment' requirement, the relative weakness of the loss distribution principle as a justification for the application of vicarious liability principles to 'not-for-profit' organizations must be regarded as an important consideration precisely because it is these very organizations that are likely to be most affected by the resultant expansion of the doctrine. For example, although the actual defendant in *Lister* was a private commercial enterprise, the majority of organizations dealing with the care of children will be run by public authorities. More importantly, the 'assumption of responsibility' type of reasoning that can be seen to underlie the recent vicarious liability decisions, to the effect that the defendant employer has held himself out as taking on responsibility for the care of vulnerable persons and thus induced a concomitant reliance on this role being properly executed, is most readily applicable to publicly provided services, for example those relating to education and medical care. Echoing the sentiments of Binnie J in *Jacobi*, while it is recognized that the basic application of vicarious liability principles to such organizations can be justified on other grounds, it is argued that the lack of weight of the loss distribution justification in this respect ought however to make the courts think twice about *extending* the no-fault liability of 'not-for-profit' enterprises.⁵⁷ Following the guidance of the European Court of Human Rights on the application of policy considerations to questions of liability, it is argued that the courts need to adopt a more balanced approach in this respect and to weigh up the policy arguments both for and against the imposition of liability.⁵⁸ As such, it cannot be ignored that one of the likely consequences of the dramatic expansion of the no-fault liability of charitable and voluntary institutions is that they will simply decide to discontinue certain services. A concern lest such a fate would befall recreational facilities such as those provided by the children's club at the centre of the claim in *Jacobi* certainly played a significant role in the formation of the majority decision not to impose vicarious liability in that instance.

As regards the use of risk theory as the primary justification for the imposition of vicarious liability in a given scenario, it has already been argued that the focus of attention should be on the *level* of risk that has been created by the defendant enterprise, and that vicarious liability ought only to be contemplated in cases where there is a high degree of the relevant harm inherent in the nature of the employment. As the decision in *Majrowski* shows, if the courts continue to rely alone on the basic notion of risk creation, then it will be difficult to impose any kind of limit on the operation of the doctrine of vicarious liability.

⁵⁷ *Ibid.*

⁵⁸ *Osman v UK* [1999] 1 FLR 193.

It must be remembered that vicarious liability is a truly exceptional form of liability. It imposes liability on a no-fault basis. It is for this reason that it requires very strong justifications. To the extent that the recent developments in the law on vicarious liability have been founded upon weak or inappropriate policy considerations, it is argued that they ought to be repudiated. If the doctrine is to retain any kind of legitimate position in the English tort system, its remit must in future be confined within the boundaries set by a strictly construed theory of enterprise risk and economic loss distribution. This may well involve a detailed analysis of the applicability of such a theory in each individual scenario in which it is sought to impose vicarious liability.

Unfortunately, the adoption of such a disciplined approach will not alone solve all of the problems currently associated with the law on vicarious liability. For there is a further conceptual problem with the doctrine that would appear to afflict the English courts. It is one that relates to the nature of the distinction between direct and vicarious liability, and in particular, the concept of the non-delegable duty.

IV. Judicial Confusion Between Direct and Vicarious Liability

In the specific context of the recent extensions of the principles of vicarious liability, judicial misunderstandings surrounding the nature of the distinction between direct and vicarious liability stem from a failure to differentiate between ordinary fault-based direct liability and the exceptional form of no-fault direct liability that is based on breach of a non-delegable duty. For it is the latter that the courts have been conflating with vicarious liability principles.

i. The Distinction Between Vicarious Liability and Ordinary Direct Liability

Vicarious liability is a form of secondary liability which arises only upon proof of the prior primary liability of another party. That is to say that the vicarious liability of the employer is dependent upon evidence of the commission of a tort by the employee, and for which the employee could be personally sued. Vicarious liability operates on a no-fault basis, and is predicated entirely upon the status of the defendant as an employer and his consequent relationship with the employee tortfeasor. No inquiry will be made into the conduct of the defendant employer, and so the fact that he may have behaved throughout in an exemplary manner will not relieve him of legal responsibility. Direct liability, by contrast, relates rather to ordinary personal responsibility for conduct, and may be conveniently described as liability for personal fault. The employer will be directly liable for breach of a duty owed personally to the claimant. Thus, while for vicarious liability purposes the main focus is on the conduct

of the employee, in direct liability claims it is instead on the conduct of the defendant employer.

Given that legal entities, as opposed to natural persons, can only ever act through their employees, the concept of direct liability on their part takes on a specific meaning, and one that would appear to overlap significantly with the notion of vicarious liability. In essence, the potential for direct liability will exist if there is a direct duty owed on the part of the defendant. Direct duties do not form the basis of many claims. As a general rule, vicarious liability will also be arguable in such circumstances, and that tends to be the route that claimants pursue.⁵⁹ Where the defendant is a legal entity being sued in respect of harm inflicted by an employee, it can also be very difficult to identify the exact nature and scope of any direct duties that may have been owed in the circumstances. They are generally very broad duties that relate to the overall safety of business operations. For instance, it has long been established that all employers owe, to the own employees, a direct duty at common law to provide competent staff, adequate plant and material, a safe place of work and a safe system of working.⁶⁰ As regards direct duties owed to non-employees, there are again a small number of very broad common law obligations imposed on any natural person or legal entity providing a service to the public. The most common example is the duty to hire competent employees to deliver the service. Since direct liability is a form of fault-based liability, it follows that such direct duties are not absolute. Rather they are only duties to exercise reasonable care in the circumstances, and so employers can avoid liability for breach of a direct duty by demonstrating that they were not at fault.

It is necessary, however, to consider separately the position of hospitals in this respect. This is because hospitals (both private and NHS-run) have historically been subject to a number of special direct duties. Such duties extend beyond the provision of competent staff and adequate facilities and equipment, to cover the provision of adequate communications systems between staff,⁶¹ and adequate systems for summoning appropriate members of medical staff to deal with specific types of emergencies.⁶² These duties are owed to patients and arise as soon as the patients either present themselves for treatment or are admitted for treatment.⁶³

To establish breach of such a direct duty, it will generally be necessary to show that there has been some kind of organizational or administrative failure on the part of the hospital. The fault inquiry will

59 See comment to this effect made by Lord Browne-Wilkinson in *X v Bedfordshire County Council* [1995] 3 All ER 353 at 392.

60 See, e.g., *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 and *Latimer v AEC Ltd* [1953] AC 643.

61 *Robertson v Nottingham HA* [1997] 8 Med LR 1.

62 *Bull v Devon AHA* [1993] 4 Med LR 117.

63 *Barnett v Chelsea and Kensington HMC* [1969] 1 QB 428.

thus usually focus on the hospital's relevant systems and procedures. As explained by Grubb, these direct duties are concerned with the fault of the organization, rather than the negligence of an individual member of staff.⁶⁴

ii. Direct Liability Based Upon Breach of a Non-delegable Duty

A non-delegable duty is a direct duty, responsibility for which cannot be delegated to another. That is to say that if the defendant chooses to delegate performance of the duty to someone else, any failure by that person to carry it out properly will be said to constitute a direct breach of duty by the defendant. As such, non-delegable duties are absolute duties, as opposed to duties of reasonable care. They give rise to an obligation on the defendant to *ensure* that reasonable care is taken. A delegate's failure to exercise reasonable care will thus, of itself, represent a breach of the defendant's duty and no further inquiry into fault will need to be made. As such, the breach of a non-delegable duty will give rise to a form of no-fault liability on the part of the defendant. By contrast to the doctrine of vicarious liability, therefore, it is the direct relationship between the defendant and the claimant that establishes the duty in this context, and then the conduct of the delegated employee that is used to establish its breach. There is no need to show that the conduct of the delegate amounts to an actual tort, and no 'course of employment' requirement applies.

The non-delegable duty is a mechanism for imposing liability for the acts of independent contractors. A limited number of non-delegable duties exist at common law and under statute.⁶⁵ Landowners, for example, are subject to a non-delegable duty to provide support for adjoining land, and those carrying out work on the highway are said to be under a non-delegable duty in respect of the performance of operations that may cause a danger to the public.⁶⁶ By far the broadest and most common forms of such duties, however, relate to the obligations on employers to ensure the safety of their employees.⁶⁷ Thus in *McDermid v Nash Dredging and Reclamation Co Ltd*,⁶⁸ the defendant

64 A. Grubb, *Principles of Medical Law*, 2nd edn (Oxford University Press: Oxford, 2004) 513.

65 In *Alcock v Wraith* (1991) 59 Build LR 16, Neill LJ listed seven categories of non-delegable duties: (1) absolute duties imposed by statute; (2) duties of support to neighbouring land; (3) duties in relation to escapes of fire; (4) duties arising under the rule in *Rylands v Fletcher*; (5) duties in relation to work carried out on the highway; (6) duties in respect of certain extra-hazardous activities; and (7) the duties of employers regarding the safety of employees. It is worth noting that although statutory duties are necessarily non-delegable on the basis that it is not possible to sub-contract out a responsibility that has been imposed by Parliament, this principle does not apply to mere statutory powers: *Rivers v Cutting* [1982] 3 All ER 69.

66 On the Canadian position in this respect, see *Lewis v British Columbia* [1997] 3 SCR 1145.

67 *Wilsons and Clyde Coal Co v English* [1938] AC 57. See also *Kondis v State Transport Authority* (1984) 58 ALJR 531.

68 [1987] AC 906.

employer was held liable for injuries sustained by one of its employees through the negligence of an independent contractor, on the basis that this negligence amounted to a breach of the defendant's non-delegable duty to provide and operate a safe system of work. Basically, the concept of the non-delegable duty is thus used to promote the efficient performance of certain important tasks by ensuring that the party in the best position to achieve that outcome is unable to foist this responsibility onto anyone else. Where the employer is not therefore in a position to control the working environment effectively, for example where an employee is sent to work overseas for a significant period of time, the duty to provide a safe system of work will cease to exist.⁶⁹

In the past, the concept of the non-delegable duty has often been used as a mechanism for the imposition of *de facto* vicarious liability for the acts of independent contractors.⁷⁰ This has been due to dissatisfaction with the operation of the pivotal vicarious liability distinction between employees and independent contractors. In short, the technical differences that are drawn between the concepts of the 'contract of service' and the 'contract for services' are not thought always to explain or justify adequately the dramatically different legal consequences that flow from the attribution of each of these labels. The concept of the non-delegable duty thus constitutes an effective tool for circumventing the exclusion of the ordinary vicarious liability principles to independent contractors, for in giving rise to a form of no-fault liability, it provides the courts with an alternative legal basis on which to achieve exactly the same outcome.

Clear evidence of this particular judicial tactic is to be found in the hospital context. It may be traced first of all to *dicta* of Lord Greene MR in *Gold v Essex County Council*.⁷¹ He reasoned in terms of a non-delegable duty in order to impose liability on a hospital in respect of the negligence of a radiographer. In his view, the hospital had assumed a responsibility to treat the patient. This created the duty which was then breached by the negligent treatment that had been provided. In terms of understanding the true motivation behind this approach, it is necessary to have regard to the specific timing of the decision. For *Gold* was decided during the *Hillyer* era, when it was thought that hospitals could not be held vicariously liable for the negligence of their medical staff. This rule stemmed from *Hillyer v Governors of St Bartholomews Hospital*,⁷² in which the Court of Appeal had taken the view that the doctrine of vicarious liability covered only the performance of 'ministerial or administrative duties'. The prevailing view at that time was that an individual only constituted an employee for vicarious liability purposes if the institution had control

69 *Square D Ltd v Cook* [1992] IRLR 34.

70 For a more detailed discussion of this point, see E. McKendrick, 'Vicarious Liability and Independent Contractors—A Re-Examination' (1990) 53 *MLR* 770.

71 [1942] 2 KB 293.

72 [1909] 2 KB 820.

over the performance of that person's duties. Since the work done by doctors and nurses involved the exercise of special professional skills, they were said to be more akin to independent contractors. Of course, it is important to note that *Hillyer* occurred prior to the creation of the National Health Service, at a time when hospitals operated primarily as charitable institutions, and benefited from a so-called 'charitable immunity', whereby they were given a significant degree of protection from legal liability.⁷³ Coming thirty years after *Hillyer*, the decision in *Gold* to impose liability for the negligence of a radiographer represented a major turning point in the law relating to hospitals. More importantly, Lord Greene MR's application of the non-delegable duty can be revealed as a deliberate attempt to circumvent the vicarious liability distinction between employees and independent contractors, and is an early reflection of judicial dissatisfaction with the manner in which it operated.

In the subsequent cases of *Cassidy v Ministry of Health*⁷⁴ and *Roe v Ministry of Health*,⁷⁵ the *Hillyer* rule was categorically abandoned on the grounds of its incompatibility with the modern structure of health provision. Moreover, in both decisions, Denning LJ also invoked the notion of the hospital's non-delegable duty. In addition to an assumption of responsibility argument, he also made reference to the fact that it is the hospital authority, and not the patient, that selects the medical staff who will dispense treatment. As this selection task forms part of the hospital's overall duty to treat the patient with reasonable care, any failure on the part of individual doctors and nurses to provide proper care will necessarily constitute a breach of duty in this respect.

In *Gold*, *Cassidy* and *Roe*, however, the majority decisions all ultimately rested on vicarious liability grounds. Indeed, it was not until 1998 that the concept of the non-delegable duty actually featured in the *ratio* of a hospital liability decision. In *M v Calderdale and Kirklees Health Authority*,⁷⁶ the claimant was referred by her NHS doctor to a private clinic for an abortion.⁷⁷ The procedure was negligently performed and the abortion failed. Imposing liability on the defendant health authority, the trial judge held that, as soon as it accepted the claimant into its care, the NHS owed her a non-delegable duty to bring about the effective provision of services, either by providing this itself or causing others to effect this on its behalf. The claimant was moreover entitled to expect an effective termination of her pregnancy from any person in whose hands she was placed by her NHS doctor. By failing to

73 See further, P. Osgode, 'The Modern Hospital and Responsibility for Negligence—Pointing the Canadian Courts in the Right Direction' (1993) 22 *Anglo-Am LR* 289.

74 [1951] 2 KB 343.

75 [1954] 2 QB 66.

76 [1998] Lloyd's Rep Med 157.

77 The claimant did not pursue an action against the private hospital because it turned out to be insolvent and uninsured.

provide the effective abortion, the NHS had thus breached its duty and was directly liable for the claimant's resultant harm.

Once again it can be seen that the concept of the non-delegable duty was used for the specific purpose of imposing no-fault liability for the acts of an independent contractor, in circumstances where it is thought that the vicarious liability distinction between employees and independent contractors operates in an arbitrary manner, and that the defendant's relationship with the independent contractor is very similar to that with his employees. It thus constitutes a back-door route to securing an extension of the principles of vicarious liability to independent contractors. Moreover, such a conclusion is supported by a recent Court of Appeal decision on the scope of *M v Calderdale*. In *A (A Child) v Ministry of Defence*,⁷⁸ the wife of a British Army soldier serving in Germany gave birth to a premature baby at a German hospital. As a result of the obstetrician's negligence, the child suffered brain damage. The care at the hospital had been arranged by an English NHS trust, which in turn had been contracted to do so by the Ministry of Defence.⁷⁹ In an action against the MoD, the case advanced on behalf of the child was that the negligence of the German obstetrician constituted a breach of a non-delegable duty of care owed to the child by the MoD. It was alleged that the duty in question was to ensure the provision of obstetric treatment that would be delivered with reasonable care and skill. The Court of Appeal refused to recognize the existence of such a duty on the part of the MoD. Giving the main judgment of the Court of Appeal, Lord Phillips MR reasoned that although there were exceptional circumstances in which a defendant might be fixed with a non-delegable personal duty to exercise reasonable care capable of making him liable for the negligent acts of an independent contractor, such duties arose only where the claimant could be shown to have suffered an injury while in an environment over which the defendant had control. In the case at hand, the link between the MoD and the German obstetrician was simply too remote. Its sole role had been to arrange for medical treatment for British service personnel and their dependants in Germany to be provided by others. Tellingly, it was suggested that such a duty would have arisen if the MoD had actually been running its own military hospitals in Germany.⁸⁰

The labelling of the obstetrician as an independent contractor in the circumstances was regarded as entirely appropriate by the Court of Appeal. Hence it did not feel the need to apply the non-delegable duty argument. In addition, Lord Phillips MR was clearly persuaded by the fact that the claimant would be able to obtain compensation from the

78 [2004] EWCA Civ 641.

79 Instead of running its own military hospitals, the MoD had contracted with the trust for it to arrange for designated German hospital providers to provide secondary health care for servicemen and their dependants in German hospitals.

80 Above n. 78 at para. 63.

German hospital through the German courts. Indeed, he appeared to be somewhat critical of the family's decision to bring proceedings against the MoD in England for the sole reason that this was a more convenient route to compensation for them.⁸¹ In his eyes, the correct route was clearly to sue the hospital directly under German law.

Although Lord Phillips MR distinguished *Calderdale* in this case, he also appeared to be somewhat critical of it, for he commented that it did not actually represent the state of English law as it existed at that time, having been based merely on *obiter dicta*.⁸² This is significant, because it indicates that the notion of the non-delegable duty still occupies a somewhat precarious position in English law. It is certainly a highly exceptional duty with a very limited remit.⁸³ Arguably its main purpose to date has been to overcome the limitations of the vicarious liability distinction between employees and independent contractors. As such, it is submitted that, as suggested by McKendrick, a better solution to this problem would be to address the definition of the independent contractor for vicarious liability purposes.⁸⁴

iii. The Non-delegable Duty Rationale Underlying the Recent Developments of the Doctrine of Vicarious Liability

While the previous findings of breach of a non-delegable duty have been artificial in the sense of amounting to backdoor routes to vicarious liability, outwardly at least, they have been properly presented as giving rise to a form of direct liability. More recently, however, not only has the non-delegable duty been put to wholly improper uses, it has been dressed up as a vicarious liability concept.⁸⁵ For it was a distinct non-delegable duty rationale that was used in *Lister* to justify its dramatic expansion of the nature and scope of employee misconduct covered by the doctrine of vicarious liability, and it was this

81 *Ibid.* at paras. 55–6.

82 *Ibid.* at para. 52.

83 By contrast, in Australian tort law, the notion of the non-delegable duty has been much more widely accepted. Indeed, it is used to impose no-fault liability on schools in respect of negligently inflicted harm to pupils. See *The Commonwealth v Introvigne* (1982) 150 CLR 258. The High Court of Australia has, however, recently declined to extend its remit to cover harm that has been inflicted intentionally, as opposed to just negligently: *New South Wales v Lepore* [2003] HCA 4. In a series of recent cases, the Canadian Supreme Court has also rejected the argument that child welfare authorities owe to the children in their care a non-delegable duty to ensure that they are not abused by foster carers: *EDG v Hammer* [2003] 2 SCR 459; *KLB v British Columbia* [2003] 2 SCR 403; and *MB v British Columbia* [2003] 2 SCR 477.

84 Above n. 70. Significantly, the recent decisions in *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd* [2005] EWCA Civ 1151 and *Hawley v Luminar Leisure plc* [2006] EWCA Civ 30 would appear to indicate that the courts are at least now prepared to address this problem more openly and that a solution is perhaps to be found in the use of a simple 'control' test to determine what constitutes an employment relationship for the purposes of a vicarious liability claim.

85 For a Canadian example of a similarly flawed approach, see *Boothman v Canada* [1993] 3 FC 381.

decision which then formed the direct basis for the subsequent extensions effected in *Dubai Aluminium, Mattis v Pollock* and *Majrowski*.

In *Lister*, Lord Hobhouse referred to a 'general proposition that, where the defendant has assumed a relationship to the plaintiff which carries with it a specific duty towards the plaintiff, the defendant is vicariously liable in tort if his servant, to whom performance of that duty has been entrusted, breaches that duty'.⁸⁶ Indeed in *Majrowski*, Auld LJ expressly interpreted Lord Hobhouse's speech in *Lister* as having been based on the notion of delegation or entrustment, 'namely that an employer is vicariously liable for the wrongful act of his employee where he has "entrusted" a duty to an employee who, by his wrongful act, has failed to perform it'.⁸⁷

Lord Clyde based his decision in *Lister* on the idea that, 'the care and safekeeping of the boys had been entrusted to the respondents and they in turn had entrusted their care and safekeeping, so far as the running of the boarding house was concerned, to the warden'.⁸⁸ Finally, Lord Millett imposed no-fault liability on the basis that '[t]he school was responsible for the care and welfare of the boys. It entrusted that responsibility to the warden. He was employed to discharge the school's responsibility to the boys. For this purpose, the school entrusted them to his care. He did not merely take advantage of the opportunity which employment at a residential school gave him. He abused that special position in which the school had placed him to enable it to discharge its own responsibilities, with the result that the assaults were committed by the very employee to whom the school had entrusted the care of the boys'.⁸⁹

To the extent that the use of the non-delegable duty rationale in this manner is illustrative of the conceptually confused judicial reasoning behind the recent developments of no-fault liability, it must give cause for concern. Indeed, it would seem that the courts are actually mixing up three distinct forms of liability: (1) ordinary fault-based direct liability; (2) exceptional no-fault based direct liability based upon breach of a non-delegable duty; and (3) vicarious liability. For it is a basic assumption of the responsibility argument (fault-based direct liability) that is being dressed up in non-delegable duty rhetoric (no-fault direct liability), ultimately to produce conclusions that are presented in vicarious liability terms. Thus, it is tenuous fault-based reasoning, which on its own would not give rise to fault liability, that is being used, via the non-delegable duty notion, to found no-fault liability. The

86 [2001] UKHL 22 at para. 56. As Giliker points out, it would also be possible to interpret Lord Hobhouse's speech in this respect as an attempt to resurrect the now discredited 'master's tort' theory of vicarious liability: above n. 15 at 275.

87 [2005] EWCA Civ 251 at para. 32.

88 [2001] UKHL 22 at para. 50.

89 *Ibid.* at para. 82.

end product is thus a combination of fault-based direct liability principles and no-fault-based vicarious liability principles but without the control mechanisms of either.⁹⁰

V. Conclusion

Not only has the recent expansion of vicarious liability been based upon a flawed understanding of the doctrine's theoretical foundation, it has been exposed as a product of judicial confusion about the nature of the distinction between vicarious and direct liability. If the courts persist with this broad policy-based approach to determining 'course of employment' issues, the inevitable result will be the creation of an uncontrollable regime of no-fault liability. If compensation and loss distribution are to represent the new overriding objectives of vicarious liability, and a basic risk theory is to become the primary tool for justifying individual findings of such liability, then there will no longer be any reason to limit the doctrine to employers. For such reasoning could be just as easily be applied to any risk-producing activity that is traditionally covered by insurance, most obviously the act of driving.

If the doctrine of vicarious liability is to maintain a legitimate position within our corrective-justice-led tort system, its remit must be controlled by a strictly construed theory of enterprise risk and efficient loss distribution. To the extent that the recent developments of the doctrine cannot be supported by reference to this theory, they may be said to compromise the basic structure of English tort law. If the courts are to persist with the current expansion of vicarious liability, then they must recognize that they are moving the tort system in the direction of a general regime of no-fault accident compensation.

90 On a related point, this elision of the principles of direct and vicarious liability will also add to the considerable difficulties that are already being experienced by institutional abuse victims in relation to the statutory limitation rules. As established by the House of Lords in *Stubblings v Webb* [1993] 1 All ER 322, while actions against employers based on breach of a direct duty are subject to an extendable three-year limitation period, those brought on a vicarious liability basis are caught by the non-extendable six-year rule. For a recent illustration of how this state of affairs operates to the disadvantage of abuse victims, see the Court of Appeal decision in *A v Hoare* [2006] EWCA Civ 395. For a comment on this decision, see C. McIvor, 'The spectre of *Stubblings v Webb* lives on' (2006) 22 PN 119.